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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

FT. HARRISON VETERANS RESIDENCE, Limited Partnership, Petitioner, vs. MONTANA BOARD OF HOUSING, Respondent, CENTER STREET LP, SWEET GRASS APARTMENTS LP, SOROPTIMIST VILLAGE LP, FARMHOUSE PARTNERS-HAGGERTY LP and PARKVIEW VILLAGE LLP, Intervenors.	Cause No. DDV-2012-356 **RESPONDENT'S REPLY BRIEF ON RESPONDENT'S CROSS MOTION FOR SUMMARY JUDGMENT ON MERITS**

Respondent Montana Board of Housing ("the Board"), by and through its undersigned counsel, hereby submits this Reply Brief on Respondent's Cross Motion for Summary Judgment on Merits.

INTRODUCTION

Fort Harrison Veterans Residence ("FHVR") mischaracterizes the Board's tax credit award determination process as one "riddled with substantial errors and abuses of discretion" and suggests that there are further errors, which it fails to specify. In fact, only 2 errors have been identified: (1) awarding all applicants 10 points for the Green/Energy requirements rather than applying the actual scores; and (2) awarding Parkview Acres 10 rather than 8 points for Special Needs Targeting. All of the other *alleged* errors and abuses of discretion are simply areas where

the Board's actual processes and QAP interpretation diverged from the processes and interpretations preferred by FHVR. There is no merit to such a portrayal of the process.

To the contrary, the totality of the materials and testimony presented to the Court demonstrate that the Board's award determination was within statutory bounds and that the Board did not act arbitrarily, capriciously or unlawfully in making this determination. The determination was based upon reasonable construction, interpretation and application of the QAP. The limited errors that occurred did not affect the outcome of the awards or affect any substantial rights of FHVR. The Court should deny FHVR's motion for summary judgment and grant the Board's cross motion for summary judgment.

I. *JOHANSEN* JUDICIAL REVIEW STANDARD.

As demonstrated in previous briefing and at the October 31, 2012 motion hearing, MAPA contested case and judicial review procedures do not apply to the Board's tax credit award determination or judicial review of that determination. The Board agreed at the motion hearing that the determination may be reviewed under *Johansen's* non-MAPA standard of review. *Johansen* permits only an inquiry as to whether the agency has stayed within statutory bounds and has not acted arbitrarily, capriciously or unlawfully. The Supreme Court held in *Johansen* that the reviewing court must defer to the agency's decision where the decision involves the agency's substantial expertise and that the reviewing court may not substitute its discretion for the discretion reposed in the agency. *Johansen*, 1998 MT 51, ¶¶ 26-27. Such is the case here, where the issues fall squarely within the expertise of the Board.

II. THE BOARD CONSIDERED AND MADE THE TAX CREDIT AWARD DETERMINATION BASED UPON THE PRIORITIES AND SELECTION CRITERIA OF THE QAP.

FHVR argues that the Board's award determination is invalid because the Board improperly considered whether LIHTCs are the best source of funding for veteran needs. FHVR argues that the Board is prohibited not only from basing its decision on any factor not listed in the QAP but is also prohibited from even considering any factor not listed in the QAP. FHVR argues that the concern at issue does not fit into any of the factors listed in the QAP and therefore, simply because a single Board member voiced a "concern" about the best source of project funding, the award determination should be reversed. These arguments lack merit.

There is nothing improper in a Board member commenting on the Board's role and mission. Moreover, it is well within the stated criteria of the QAP to consider whether and how an award to one particular project compared to other projects would best meet the housing needs of low income Montanans. This is the stated QAP factor to which the Board member's comment properly related. It is well within the proper function of the Board to consider all of the characteristics of a project and the overall comparative housing needs of respective areas and populations of the state. FHVR's reading of the QAP and the Board's role would unreasonably and inappropriately constrain the Board in the exercise of its duties.

FHVR asks the Court to reject the suggestion that the Board relied upon anything other than the scoring. FHVR quotes Ms. Bair's deposition testimony stating that the Board "didn't go outside of the points." The Board does not argue that it did not consider, or make its award consistent with, the scoring. The Board's awards were consistent with the scoring and the Board's argument is consistent with Ms. Bair's testimony. Ms. Bair did not testify that the Board's decision was based exclusively on the scoring and scoring was not the *exclusive* basis or consideration for the award determination. There is ample evidence before the Court of the considerations and basis of the Board's decision in the materials provided to the Board throughout the application, evaluation and award process. The Board considered all of the information presented to it in the course of the process and made its determination on that basis. Again, the Court should reject FHVR's argument that the scoring was the only consideration or that the scoring must control the award determination

A. <u>The Board Did Not Fail to Make or Keep Any Required Records</u>.

FHVR argues that the Board failed to keep required records and suggests that the Board is trying to hide behind such failure. However, FHVR has failed to provide any authority for its contention that the Board is required by law to maintain the records that FHVR would prefer.

FHVR argues that, if the Board bases its decision on the scoring, then no explanation of the decision is necessary. However, FHVR argues, if the Board bases its decision on something other than the scoring, then an additional explanation is necessary so that there will be a record for judicial review. For this argument, FHVR relies upon *Owens v. Dep't of Revenue*, 2006 MT 36, 331 Mont. 166, 130 P.3d 1256, arguing that judicial review of a contested case requires an administrative record and suggesting that "numerous exhibits" are insufficient to constitute such

a record. FHVR suggests that the Board is attempting to escape judicial review by its "refusal to comply with MAPA record requirements and its overall poor recordkeeping." FHVR Reply Brief at pp. 5-6.

Owens does not apply because, as demonstrated in the Board's prior briefing, this matter is not a MAPA contested case that would require the kind of record preferred by FHVR. *Owens* involved a contested case challenging the state's revocation of a liquor license. After the license was revoked, a contested case hearing was conducted pursuant to MAPA. The Hearing Examiner issued Findings of Fact, Conclusions of Law, a Memorandum Opinion, and a Proposed Order recommending license revocation. The licensee filed exceptions and objections and the agency filed a response brief. After oral argument, the agency director issued a final agency decision revoking the license. *Owens*, 2006 MT 36, ¶¶ 7, 8. The licensee filed a petition for judicial review and the district court issued a decision. The decision was based upon various documents and exhibits submitted by the parties. The reviewing court did not review the administrative record because the agency did not submit it to the court. *Id.* at ¶ 9.

The Supreme Court held that in judicial review of a MAPA contested case, the reviewing Court must confine itself to a review of the record, noting that MAPA specifies what the record must include "in a contested case." *Id.* at ¶ 12, citing §§ 2-4-614(1) and 2-4-704(1), MCA. The Court held that MAPA required submission and review of the contested case record as defined by MAPA. *Id.* at ¶ 13. Accordingly, the Court remanded the case to the district court to conduct the review based upon the MAPA contested case record. *Id.* at ¶ 16. The holding in *Owens* was explicitly based upon MAPA contested case record requirements. These "record" requirements do not apply to the Board's award determination, which is not a MAPA contested case.

FHVR also suggests that the Board was required to make and provide a written explanation of its award determination, arguing that if the award was based upon factors "outside the scoring," then the QAP requires that it publish an explanation of the decision. FHVR relies for this argument upon the QAP provision requiring publication of a written explanation where an award is "not in keeping with the established priorities and criteria" of the QAP. *See* QAP, p. 25, Exhibit 1 to Bair Dep. FHVR's argument lacks merit.

FHVR's argument misconstrues this QAP provision and contradicts plain language of the QAP. FHVR's argument incorrectly assumes that the Board's consideration of anything other

than the application scores is "not in keeping with" the QAP priorities and criteria. However, all of the QAP provisions, including the listed factors, are themselves part and parcel of the QAP's priorities and criteria. A Board award "outside the scoring" is not necessarily an award that is not in keeping with the established priorities and criteria of the QAP. The QAP provides that the Board will "*select*" projects to receive an award that "it determines best meet the needs of low income people" and that "*in selecting projects*" it may consider the listed factors. QAP, pp. 24-25. The "best meets" determination and the listed factors are explicit priorities and criteria of the QAP. The award was in keeping with the established priorities and criteria of the QAP and, based upon its clear and unambiguous language, the QAP's written explanation provision does not apply.

FHVR further alleges that the Board failed to produce documents in response to its records request and then later submitted such documents as exhibits in this action. The only such documents actually identified by FHVR are the April 9, 2012 Board meeting minutes and documents reflecting staff recommendations to the Board. The Board made every effort to comply in good faith with FHVR's record request and believes that it did so, producing 9,950 pages of documents in response to the request. *See* July 23, 2012 Letter from Greg Gould to Mike Green, attached hereto as Exhibit V. Any failure to produce such records was inadvertent.

Even if not provided earlier, the April 9, 2012 Board minutes were provided to FHVR as Exhibit K to the Affidavit of Mary Bair, filed herein on July 27, 2012. The Board produced documents in response to FHVR's records request in several batches, the last of which was produced on July 23, 2012. *See* Exhibit V, *supra.* FHVR also alleges that the Board failed to produce documents reflecting staff recommendations to the Board based upon the scoring. Again, if in fact these documents were not previously produced, such omission was inadvertent. Moreover, FHVR admits that the staff communicated and published the staff's application scores on April 3, 2012. FHVR Reply Brief at p. 14.

FHVR fails to identify how such alleged late production of these documents prejudiced it or affected any of its substantial rights. Having received such documents well prior to submission of its last brief, FHVR has had every opportunity to submit argument regarding such documents.

FHVR also seeks to undermine the credibility of evidence submitted by the Board with respect to the present summary judgment motion by characterizing such evidence as "new and

conflicting" evidence, and claiming that the Board is asking the Court to summarily disregard Ms. Bair's testimony.

Of course, Ms. Bair has been deeply involved with the LIHTC program and is familiar with the Board's operations. However, Mr. Brensdal has even more experience with the program than Ms. Bair. *See* Brensdal Aff., ¶¶ 2, 3; Bair Aff., ¶¶ 2, 3; Bair Dep., 11:21-23; 12:16-21; 12:22-13:16. Mr. Brensdal is Ms. Bair's supervisor and previously held the position now held by Ms. Bair. Mr. Brensdal participated in the process of scoring the 2012 tax credit applications and his testimony is entitled to credit. FHVR has selectively chosen less than the full testimony of Ms. Bair in an effort to support its claims. However, while Ms. Bair and Mr. Brensdal have some differing perceptions on a few points, each witness's testimony is largely consistent with the other's. The Board believes that when it reviews Ms. Bair's deposition in its entirety, it will find that it is substantially consistent with Mr. Brensdal's affidavit.

Even considering the experience of these Board staff members, there are issues that turn upon construction of plain and unambiguous QAP language and upon which the Court need not resort to staff testimony regarding the meaning of the provision. There are other provisions that are indeed ambiguous and upon which such testimony is relevant to determination of the Board's interpretation of such provisions. Staff testimony is not controlling on questions of law. Just because FHVR deposed Ms. Bair and asked her opinion on a variety of questions does not make her statements legally controlling on all such points.

The present summary judgment motions are the first motions before the court which consider whether the Board acted arbitrarily and capriciously in scoring the applications and making its tax credit award determination. In supporting its position on the motions, the Board is not limited to FHVR's deposition of a single staff member. The Board is entitled to submit affidavits and other material permissible under Rule 56.

III. THE BOARD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR UNLAWFUL.

FHVR questions every conceivable point it can find in an effort to undermine the Board's determination and to suggest that it should have been awarded tax credits. But when one considers the basis upon which the Board scored the applications and awarded tax credits, it is apparent that that the Board had good and proper reasons for scoring the applications as it did

and that it acted reasonably, rather than arbitrarily or capriciously, and within the bounds of the law.

A. The Board Reasonably Construed and Interpreted the QAP Language.

FHVR argues that staff "added undisclosed criteria to the scoring provisions that cannot be construed as reasonable interpretation" and that were "patently beyond the plain meaning of the QAP." FHVR Reply Brief at p. 3. The staff did not apply additional undisclosed criteria and the Board does not argue that staff can add requirements to the QAP. Rather, the staff construed or interpreted the actual QAP criteria and applied reasonable constructions or interpretations of the actual QAP criteria. The criteria that FHVR characterizes as "additional" are simply the criteria in the QAP itself, as reasonably construed or interpreted by the Board.

FHVR further argues that *Glendive Medical Center* is distinguishable from the present case. *Glendive* sets forth the rules of construction applicable to administrative rules in instances where the rule is unambiguous. The specific scenario presented in *Glendive* is comparable to the unambiguous QAP provisions at issue here, although not to those that are ambiguous. The present case involves both ambiguous and unambiguous rules. *Glendive* is applicable for the propositions cited by the Board in its brief. Moreover, FHVR has not disputed that agencies have authority to construe, interpret and apply their own rules and that courts accord deference to an agency's reasonable interpretation of its own rules. The Board reasonably construed and interpreted the QAP, notwithstanding FHVR's strained and self-serving interpretations of the QAP.

B. Board Staff's Actual Green/Energy Scores Correctly Applied the QAP Criteria.

FHVR argues that the Green/Energy section of its application should have received a score of 10 out of 10 possible points in the actual scoring, and that, as a result, FHVR should have received a score of 102 points and an award of tax credits. FHVR argues that the actual score determined by staff was incorrect because the QAP did not require applicants to meet the threshold requirements in order to receive discretionary points and argues that the Board awarded other applicants full points on the threshold window requirements based upon similar architect letters. FHVR argues – based upon an assumption that *all* of its arguments for more points will succeed – that had the correct actual scores been applied, it would have tied for the highest score.

In support of its argument, FHVR selectively quotes a limited portion of Ms. Bair's testimony on this point to create a misleading impression that she agreed with FHVR's interpretation. The Court should consider the remainder of her testimony. Ms. Bair also testified as follows:

> The threshold items must exceed the 2009 IECC standards. Insulation and windows are threshold items, and it [FHVR's architect letter] says that they will meet [those standards]. That means that they would not get the points for the threshold item. They would get one point, they would have gotten one point for the boiler, one point for the Energy Star. *They wouldn't have gotten any of the rest of those because they have to get the threshold items before they can get any of the rest of the items.* So they would have lost all of the discretionary items there. So they would have gotten four points on the green. And only two points on the energy.

(emphasis added). Bair Dep. at 79:12 - 80:6. Ms. Bair further testified:

> Q. And you indicated you don't get any discretionary points if the threshold was not met?
>
> A. Right.
>
> Q. Can you point out to me where that is called out in the QAP?
>
> A. Well, it says the threshold. *So if you don't have the threshold, usually you don't go beyond the threshold.* It doesn't state that, but that's the way our understanding of it was.
>
> Q. Okay. And when did you determine that that was the understanding?
>
> A. The understanding about the threshold or the understanding about a lot of them didn't understand?
>
> Q. The understanding about the threshold.
>
> A. *We've always had it that way, as far as I know.*

(emphasis added). Bair Dep. at 80:21 - 81:11; *see also* Brensdal Aff., ¶ 30.

Obviously, the word "threshold" has to mean something and Ms. Bair gave the word its usual and ordinary meaning. She agreed that the definition of "threshold" – "if you don't have the threshold, usually you don't go beyond the threshold" – was not stated in the QAP. But the word still must be given its ordinary meaning, which is precisely what she did in applying the criterion and scoring the applications. The Board's standing interpretation of the rule language is reasonable and should be given effect. FHVR's unreasonable interpretation would read the word "threshold" entirely out of the QAP provision and should be rejected.

FHVR also argues that staff incorrectly awarded points to 2 other applicants for architect letters which, according to FHVR, fail to meet the QAP's requirement that the architect letter confirm that the projects would exceed the IECC 2009 standards for windows. FHVR

incorrectly asserts that, even though the architect letters for these other projects did in fact confirm that the projects "shall exceed" the standards, additional language in the architect letters indicated that such confirmation was false. This argument has no merit.

As noted in the Board's initial brief, applicants were required to submit with their applications a letter from an architect confirming the Green/Energy initiatives incorporated into the project and explaining how, and by what amount, certain threshold items will exceed the IECC 2009 standards. FHVR's architect letter stated that it would *meet* – but did *not* confirm or in any way indicate that it would *exceed* -- IECC 2009 standards for windows. To obtain the 2 available points for windows, the architect's letter was required to state that the standard would be *exceeded.* Therefore, FHVR did not meet this requirement and did not receive the 2 points available for this item.

By contrast, the architect letters for applicants Depot Place and Aspen Place each confirmed that windows would *exceed* IECC 2009 standards for windows, stating as follows:

> Windows: All windows used in the project *shall exceed* the requirement of the IECC 2009 Standards for Climate Zone 6. Zone 6 windows are required to have a U Factor = 0.33.
>
> i) All new windows shall have a maximum glazing U-Factor range of 0.30 to 0.33. Smaller windows have a higher U-factor that is less efficient. We are striving for windows with a U-Factor of 0.32 or lower.

(emphasis added). FHVR's Exhibits B and C. This architect language complies with the QAP requirement, confirming that "[a]ll windows used in the project *shall exceed* the requirement of the IECC 2009 standards." (emphasis added).

In addition to this required confirmation, the architect letters go on to explain that the IECC 2009 standard for windows is a U-Factor of 0.33 and that the U-Factor range for windows will be from 0.30 to 0.33 and that they are "striving for windows with a U-Factor of 0.32 or lower." FHVR incorrectly argues that this additional language somehow defeats the confirmation that all windows "shall exceed" the standard.

To the contrary, this additional language simply provides additional detail required by the QAP, explaining how and by what amount the item will exceed the IECC 2009 standards. This information indicates that the applicant will exceed the standard by achieving a U-Factor as low as 0.30 and will strive to achieve a U-Factor no higher than 0.32, which exceeds the standard by

a U-Factor of 0.01. This does not in any way render "false" or defeat the confirmation that all windows used in the project shall exceed the requirement of the IECC 2009 standard.

Board staff correctly scored the Depot Place and Aspen Place applications for Green/Energy requirements by awarding full points for the threshold window requirements. Their architect letters included the required confirmation. By contrast, FHVR's architect letter did not include the required certification that windows would exceed the IECC 2009 standards and staff correctly scored FHVR's application by declining to award points for this item.

The Court should reject FHVR's disingenuous effort to have it both ways on this issue – it contends the actual scores should not have been disregarded but also contends that its actual score should not count against it. Board staff correctly scored FHVR's application and the other referenced applications on this QAP section. The unauthorized staff decision to award all applications 10 points rather than actual scores was a discrete error that is easily corrected by using the actual scores which were assigned before the decision was made to award 10 points to all applicants. Upon doing so, it is apparent that the award outcome was not affected.

C. The Board Reasonably and Correctly Scored FHVR's Application for Project Location.

FHVR argues that staff improperly added to the Project Location criteria by considering how tenants would avail themselves of area services and amenities based upon information about transportation actually included in FHVR's application. FHVR suggests that the Board improperly considered services not listed in or which could not be inferred from the QAP language. However, FHVR dismisses -- and its argument ignores -- the staff's actual basis for scoring its application for Project Location.

FHVR argues that staff's consideration of transportation availability (or lack thereof) was improper despite the rule's specific reference to "availability" of "transportation" to tenants. Transportation itself is a listed amenity or service, and the lack of readily and dependably available transportation during normal daily business hours and the lack of any transportation during evening and night hours goes directly to the explicitly stated criteria. The Board relied on information about transportation that FHVR itself provided in its application, indicating a lack of public transportation availability. The QAP plainly and unambiguously provides that transportation availability is considered in the scoring. FHVR's argument to the contrary lacks

merit.

FHVR incorrectly asserts that the Board is relying upon "new arguments and rationale" for the scoring of FHVR's Project Location. The Board's rationale and arguments regarding transportation are not "new" as alleged by FHVR. The rationale described in Mr. Brensdal's affidavit and the Board's brief was the rationale applied by Board staff in its scoring of FHVR's application. Brensdal Aff., ¶¶ 6-13. In fact, Ms. Bair discussed the same rationale in her deposition and there is no inconsistency in the interpretation they have both described. Bair Dep. 94:6-99:23; 132:12-134:2. The present cross motions for summary judgment on the merits are simply the first motions before the Court on which the Board's scoring rationale is relevant and therefore presented by the Board.

As noted in the Board's initial brief, FHVR's location is unlike that of any other applicant project location because of its distances and isolation from non-medical amenities and services and because of the lack of readily available transportation to access such amenities and services. *FHVR has not disputed this.* Yet, FHVR suggests that these considerations are not relevant to determining the availability of amenities and services to tenants living at the project location. These considerations are within the plain language of the QAP and the staff properly considered these factors and awarded FHVR 2 of 3 possible points for Project Location.

D. The Board Reasonably and Correctly Scored FHVR's Application for Special Needs Targeting.

FHVR concedes that "units must be targeted" for purposes of the Special Needs Targeting provision, but argues that the QAP is silent on whether specific units must be "identified" and that nothing in the QAP language prohibits double counting of units. FHVR argues that there is no language in the rule indicating that an applicant cannot target the same percentage of units for more than one special needs category and that the Board cannot refute its argument. FHVR's argument ignores the language of the QAP.

The Board's interpretation and scoring rationale are supported by the language of the QAP. Based upon the plain language of this rule -- *"one (1) point for each 10% of the units targeting the following identified needs"* -- an applicant is not entitled to points for units that are not targeted to at least one of the specified need categories. One point is available for each 10% targeted, up to a total of 10 points, corresponding to 100% of the units. Further, based upon the

plain language of the rule, to qualify for points units must be "*targeted specifically*" for persons with disability. FHVR's application targeted only 29 of its 40 units and did not commit to targeting of the remaining 11 units to disabled or any of the other specified need categories. Therefore, it was not entitled to points for such non-targeted units.

FHVR again asserts incorrectly that the Board has introduced new and unsupported justifications for its actions. To the contrary, the Board's rationale and arguments regarding this section are not "new" as alleged by FHVR. The rationale described in Mr. Brensdal's affidavit and the Board's brief was the rationale applied by Board staff in its scoring of FHVR's application. Brensdal Aff., ¶¶ 14-19. Ms. Bair also testified regarding this rationale. Bair Dep. 83:17-85:1; 130:25-132:11; 145:3-10. And again, the present cross motions for summary judgment on the merits are simply the first motions before the Court on which the Board's scoring rationale is relevant.

FHVR argues that the Court should accept its argument regarding the disability services agreement because the Board "refuses to address this argument in its brief." In fact, the Board addressed this issue at pages 17-18 of its initial brief. As Mr. Brensdal's affidavit indicated, staff discussed FHVR's agreement but he did not believe they relied upon this issue in the scoring. This difference in perception is not material, however, because regardless of whether the service agreement met requirements, an additional 3 points could not have been awarded to FHVR because FHVR did not target 11 of the units to any of the specified need categories. Brensdal Aff., ¶ 19; Bair Dep., 130:25-132:11; 145:5-10.

Board staff reasonably interpreted and applied the QAP, and awarded FHVR 7 of 10 possible points for Special Needs Targeting.

E. The Board Reasonably and Correctly Scored FHVR's Application for Montana Presence.

FHVR argues that Board staff added requirements to the QAP's Montana presence requirement and unreasonably failed to award it all 4 possible points based upon the professionals listed under the section's last bullet point. This argument is inconsistent with the language of the QAP provision.

Obviously, the 2012 QAP's Montana Presence provision is not a model of clarity. The provision allows an award of up to 4 points for this section and indicates that one point will be

awarded for each bullet point. However, the provision is silent and therefore ambiguous as to the basis for award of the 4th point.

What is clear and unambiguous in the Montana Presence provision is that the third bullet point considers all of the project consultants, syndicators, attorneys, accountants, architects and engineers together as a single item. The language states that a point is awarded for "either" of these professionals. FHVR asks the court to interpret this provision by omitting the word "either," contrary to the rules of statutory construction. While the use of the word "either" in this clause is not grammatically correct, it clearly indicates an intent that points are not awarded for each separate professional listed in the bullet point.

Considering all of the affidavit and deposition testimony regarding scoring of Montana Presence for FHVR, it appears that FHVR was awarded 2 of 4 possible points in the Montana Presence category, based upon the inclusion of several of the professionals listed in the last bullet point and because its application did not indicate that its developer or project manager (first bullet) or its contractor or construction manager (second bullet) had any Montana presence, such as owning an existing affordable housing project in Montana, being licensed in Montana or having an office in Montana. Brensdal Aff., ¶ 23; Bair Aff., ¶ 19; Bair Dep., 73:16-74:16; 74:24-76:14; 128:19-129:21. At most, FHVR received an extra point to which it was not entitled.

FHVR's unreasonable interpretation would allow an applicant to receive all 4 points in this section without any Montana presence among the key overarching roles of developer, project manager, or contract or construction manager. This is precisely what would occur for FHVR here, because unlike the other applicants it lacked Montana presence in any of the key overarching roles of developer, project manager, or contract or construction manager. *FHVR does not dispute this fact.* The Board's award of points on this item is reasonable and consistent with the plain language of the QAP. Reading the provision as a whole, the Board correctly considered *all* of the areas identified for point awards and reasonably awarded FHVR 2 of 4 possible points.

F. The Montana Presence Provision Does Not Discriminate Against Interstate Commerce.

FHVR argues that the dormant commerce clause case law relied upon by Intervenors and the Board is invalid. FHVR argues that the cited *Keystone* decision involved only a concurring

and dissenting opinion regarding this issue rather than a majority decision of the Third Circuit Court of Appeals. FHVR also argues that the principles relied upon from *Keystone* are contrary to well-established law. FHVR argues, contrary to the very authorities it cites, that even the most minor and incidental effects on interstate necessarily constitute discrimination sufficient to invoke heightened scrutiny and *per se* invalidity. FHVR further argues that even if the Montana Presence provision is subject to a lower level of scrutiny, the Board cannot justify the provision. FHVR's arguments lack merit.

FHVR correctly notes that the *Keystone* opinion cited by Intervenors is a concurring and dissenting opinion. The majority opinion in *Keystone* did not address the commerce clause argument because the majority dismissed the commerce clause claims based upon immunity grounds. However, contrary to FHVR's argument, the *Keystone* concurring opinion's reasoning is consistent with established case law. Moreover, the *Keystone* concurring opinion validly and persuasively distinguishes cases involving complete and absolute barriers to interstate commerce from cases involving only incidental effects.

FHVR relies upon a series of cases from facially discriminatory tax statutes and waste management fee statutes that are distinguishable from the provision at issue here. There is no substantial difference among the general principles cited by all parties here on the commerce clause analysis. However, none of the cases cited by FHVR are based upon any facts similar or even faintly analogous to the present scenario.

The applicable standard is stated in the various cases: where a state law *facially discriminates* against interstate commerce, the courts observe a virtually *per se* rule of invalidity. Where a state law is nondiscriminatory, but nonetheless adversely affects interstate commerce incidentally, the courts employ a deferential balancing test, under which the law will be sustained unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *See Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99, 114 S.Ct. 1345, 1349-1350, 128 L.Ed.2d 13 (1994).

However, while the Supreme Court has stated that "discriminatory laws" are subject to a *per se* rule of invalidity, the Court has recognized that not all cases actually involve "discriminatory" laws. Indeed, *Oregon Waste Systems*, cited by FHVR, itself recognizes that the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is

to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Oregon Waste Systems*, 511 U.S. at 99, 114 S.Ct. at 1350. This indicates that there is a threshold inquiry as to whether or not the effects of the regulation are merely incidental or rise to actual discrimination. Nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970).

The cases relied upon by FHVR involved laws that were *facially discriminatory* against interstate commerce. As such, these laws were considered discriminatory for purposes of commerce clause analysis and were therefore subjected to heightened scrutiny. *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of Ore.*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (statute imposing surcharge of $0.85 per ton on in-state waste while imposing a $2.25 per ton surcharge on out-of state waste deemed obviously discriminatory on its face); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 327-28, 116 S.Ct. 848, 852 (1996) (state "intangibles tax" on the fair market value of corporate stock that allowed state residents to reduce tax liability to the extent the issuing corporation's income was subject to tax in the state facially discriminated against interstate commerce); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 271-74, 108 S.Ct. 1803, 1806-08 (1988) (state law that awarded credits against fuel sales tax for each gallon of ethanol sold if ethanol produced in state was explicitly discriminatory); *Camps Newfound v. Town of Harrison,* 520 U.S. 564, 572-78, 117 S.Ct. 1590, 1596-99 (1997) (statute allowing exemption from property taxes for charitable corporations operated for benefit of state residents discriminated on its face against interstate commerce); *Maryland v. Louisiana*, 451 U.S. 725, 732-33, 756-58, 101 S.Ct. 2114, 2121-22, 2134-35 (1981) (tax scheme providing exemptions and tax credits on a facially discriminatory basis).

In such cases involving facially discriminatory laws, the Court noted that *once a law is determined discriminatory*, the degree of discrimination is not relevant. However, the Court did not hold that the degree is irrelevant in cases of mere incidental effects on interstate commerce. In contrast to the cases cited by FHVR, the present case involves a nondiscriminatory provision – one that is not facially discriminatory against interstate commerce and which, at most, has only incidental effects upon interstate commerce.

The Montana Presence provision does not facially discriminate against out-of-state applicants. The Montana Presence provision applies equally to all applicants. The Montana Presence provision does not deprive out-of-state applicants from consideration for and award of tax credits. Out-of-state applicants may receive points for Montana presence and may receive tax credits. Indeed, FHVR's application met the mandatory requirements of the QAP and exceeded the minimum development selection criteria score of 80 points, and was therefore fully considered by the Board for an award of tax credits. Bair Aff., ¶¶ 19-20. Similarly, in-state applicants may fail to score points for Montana presence.

Moreover, the significance of the Montana Presence provision to an award is minimal. The QAP simply considers -- as one of many QAP factors -- the degree to which the various members of the applicant's development team have a Montana presence. Consideration of Montana presence rationally relates to the ability of the development team to successfully plan, permit, develop, construct and bring a project into service for the intended beneficiaries of the program, *i.e.,* persons needing and qualifying for low-income housing. This consideration is designed to assist in assuring that allocated tax credits actually result in bringing into service the housing units contemplated in awarding the credits, rather than having the credits returned because the project could not be completed in the local Montana building environment within the applicable time limits and in compliance with other requirements. Bair Aff., ¶ 21; Bair Dep., 76:25-77:18.

Even assuming for the sake of argument that the Montana presence provision was invalid, there is no basis or reason to strike the entire QAP, as this provision can simply be removed from consideration. However, FHVR would gain only 2 additional points in the scoring. As demonstrated below, these additional 2 points would not affect the award outcome, even if the awards were based solely upon scoring.

G. The Limited Errors in the Tax Credit Award Determination Process Did Not Substantially Affect the Results.

FHVR argues that the award process was "riddled" with substantial errors and abuses of discretion and that the Board's acknowledged errors in the scoring process were "pervasive." FHVR incorrectly alleges that with each review of the scoring process, more errors are disclosed. FHVR has manufactured alleged problems without any legal support and then argues that the totality of such

errors require reversal. In fact, there were no such "pervasive errors" in the award process.

In fact, only 2 errors have been identified: (1) awarding all applicants 10 points for the Green/Energy requirements rather than applying the actual scores; and (2) awarding Parkview Acres 10 rather than 8 points for Special Needs Targeting. All of the other *alleged* errors and abuses of discretion are simply areas where the Board's actual processes and QAP interpretation diverged from the processes and interpretations preferred by FHVR. There is no merit to such a portrayal of the process. As demonstrated in the Board's initial brief, these errors do not affect the outcome.

FHVR alleges as errors the Board's interpretation of its QAP, not making and keeping the records that FHVR prefers, staff communication with applicants and minor application corrections. FHVR diminishes the significance of its own communications with Board staff, including its telephone call to challenge the staff scoring, its email communications with staff concerning QAP requirements, and the additional information provided in its post-application letter considered by staff and the Board. FHVR argues that its letter was submitted after the scoring and that even then the Board "summarily dismissed" the letter. In fact, the Board allowed FHVR the opportunity to present the letter and heard FHVR's comment regarding the scoring issues addressed in the letter. The Board also heard from staff on these issues. FHVR dismisses the email communications it had with staff, while continuing to argue disingenuously that such communications improperly advantaged other applicants and that it did not get the same opportunity or advantage. Moreover, despite this alleged summary dismissal and disadvantage suffered by FHVR, its application received special consideration by the Board and a vote despite the alleged incorrect scoring.

Again, FHVR has shown no unfairness or prejudice from any of these aspects of the process. In fact, the process was "riddled" with nothing more than a process different than the process that FHVR now – in retrospect – prefers, i.e., any process that would result in its receiving an award of tax credits.

FHVR argues that the erroneous awarding of 10 rather than 8 points to Parkview Acres on Special Needs Targeting demonstrates "pervasive problems" with the process. FHVR argues that "[w]ith each review, the Board uncovers more errors." Again, this is simply false. As noted, the Board agrees that the decision not to apply actual green/energy scores was unauthorized. The

only "problem" uncovered in further Board review was the error in awarding Parkview 10 rather than 8 points for special needs targeting.

FHVR concedes that the "extent of these [unspecified] errors is unknown" but argues that the presence of alleged errors "logically suggests that other similar errors are present elsewhere in the process." FHVR Reply Brief at p. 4. The Board has provided FHVR with copies of all of its documents relating to the 2012 tax credit application, including documents relating to the scoring and award process. If there are further problems with the scoring, then FHVR should have identified them and presented supporting evidence. It has not. The Court should reject FHVR's attempt to suggest "pervasive errors" without providing evidence that such errors occurred.

IV. FHVR WOULD NOT RECEIVE AN AWARD OF TAX CREDITS EVEN IF THE SCORING WERE CORRECTED TO ADJUST FOR THE LIMITED ERRORS.

Again, FHVR argues that the Board's decision was erroneous in light of the whole record because a proper decision would have resulted in an award of credits to FHVR. To the contrary, FHVR's argument fails to consider the whole record and is inconsistent with the QAP language as reasonably interpreted and applied by the Board.

As explained in the Board's initial brief, when the actual Green/Energy scores are applied and the error in scoring the Parkview Apartments Special Needs Targeting, there is no change in FHVR's scoring rank. Moreover, even if it received all of the additional points it claims (but to which it demonstrably is not entitled), it still would not be entitled to receive an award based upon scoring rank. Brensdal Aff., ¶¶ 35, 37. See October 29, 2012 Respondent's Combined Brief at pp. 18-19 for a complete discussion, which will not be duplicated here.

Even if the Energy and Green Requirement actual scores are applied as required by the QAP and Parkview's Special Needs Targeting score is corrected, FHVR's application remains 9th out of 11 competing applications and its project would not have been awarded tax credits based solely upon the scoring. Brensdal Aff., ¶ 35. Further, even assuming for the sake of argument that FHVR was entitled to all of the 6 additional points it claims for Green/Energy requirements, which the Board disputes, FHVR's total score would have been only 102 points – *tied for 7th place in scoring rank* – and based solely upon scoring FHVR's project would not have been awarded tax credits. Brensdal Aff., ¶ 37.

CONCLUSION

Board staff's scoring of FVHR's application and the Board's award determination were not arbitrary, capricious or unlawful. The Board's scoring of FHVR's application was reasonable, supported by the information in the application, and lawfully based upon reasonable interpretation of the QAP. The Board's decision was reasonable based upon consideration of all of the information and documents it received and considered for purposes of the determination, and would not be affected or changed by correction of the errors identified. FHVR's motion for summary judgment should be denied and the Board's motion for summary judgment on the merits should be granted.

Respectfully submitted this 5th day of December, 2012.

LUXAN & MURFITT, PLLP

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CERTIFICATE OF SERVICE

I, Gregory G. Gould, certify that on the 5th day of December, 2012, a true and accurate copy of the foregoing REPLY BRIEF ON RESPONDENT'S CROSS MOTION FOR SUMMARY JUDGMENT ON MERITS was duly served upon counsel of record listed below by depositing the same, postage prepaid, in the United States mail to:

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July 23, 2012

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Re: Freedoms Path Request for Documents

Dear Mike:

Enclosed herewith please see the Montana Board of Housing's (MBOH) fourth production of documents responsive to your April 23, 2012 request for production of documents made on behalf of Ft. Harrison Veterans Residences L.P.

The enclosed documents include the following:

1. Fort Harrison Veterans Residence's LIHTC application materials are attached hereto bates labeled MBOH/2012 LIHTC/006170 - MBOH/2012 LIHTC/006900; and
2. Miscellaneous e-mails are attached hereto bates labeled MBOH/2012 LIHTC/006901 - MBOH/2012 LIHTC/009950.

Taxpayer identification numbers ("TIN") and employer identification numbers ("EIN") have been redacted from the foregoing documents. With this production, we have produced the last of the documents requested. If you have questions regarding this matter, please do not hesitate to call.

Sincerely,

GREGORY G. GOULD

for LUXAN & MURFITT, PLLP

GGG/sh
Enclosure
c: Bruce Brensdal/Ty Jones